SUPERIOR COURT
OF THE
STATE OF DELAWARE

T. HENLEY GRAVES
RESIDENT JUDGE

SUSSEX COUNTY COURTHOUSE
ONE THE CIRCLE, SUITE 2
GEORGETOWN, DE 19947

August 10, 2010

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Re: State v. Ralph E. Batchelor, Jr.
Case No. 1001011823

On Defendant's Motion to Suppress: DENIED

Date Submitted: July 23, 2010
Date Decided: August 10, 2010

Dear Counsel:

Pending before the Court is Ralph Batchelor's Motion to Suppress. For the reasons stated herein, that motion is denied.

Facts & Procedural Background

Ralph Batchelor (hereinafter, "Defendant") was arrested on a number of driving related offenses: driving under the influence, two counts of first degree reckless endangering, driving after judgment prohibited, driving while license suspended or revoked, failure to have registration card in possession, failure to have required insurance and failure to have license in possession. Defendant filed a Motion to Suppress.

After an evidentiary hearing on the Motion to Suppress, held on July 8, 2010, the following facts are before the Court. On January 16, 2010, an employee of the Food Lion in Laurel, Sussex, County, Delaware, heard the squealing tires of a vehicle and observed a white truck. The employee

did not see the driver of the truck get out of the car but a patron pointed out the driver to the employee. The patron further stated she was almost hit by the vehicle. The employee placed a 911 call reporting erratic driving in the Food Lion parking lot. Pfc. Carlos Granados responded to the call. The driver of the vehicle was in the store at the time Pfc. Granados arrived. Pfc. Granados spoke with the employee who made the 911 call. Ralph Batchelor ("Defendant") is pointed out to Pfc. Granados as the driver of the white truck as he walked out of the Food Lion. Defendant walked to the previously identified truck and got into it. Pfc. Granados approached the vehicle and knocked on Defendant's window as he started to back out. Defendant stopped and rolled down his window. Pfc. Granados testified that it was at that point he detected a strong odor of alcohol and asked Defendant if he had been drinking. Defendant responded, "You'll have to speak to my lawyer," or words to that effect.

Pfc. Granados told Defendant to stay where he was[1] and Pfc. Granados returned to the Food Lion to get more information from the person who had seen Defendant driving the vehicle, specifically, the person who was almost hit by Defendant's truck. Upon his return, Pfc. Granados asked Defendant to produce identification and registration information. Defendant stated he did not have his driver's license on him and could not produce a registration card or proof of insurance. Pfc. Granados conducted a DELJIS check and learned Defendant's license was revoked. At that point, the officer asked Defendant to perform some field sobriety tests and Defendant complied. Defendant failed the tests he was able to perform.[2] Defendant was subsequently arrested on the charges listed, *supra*.

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[1] At this point in time, another police officer had responded. Defendant was left in the presence of that officer.

[2] Due to a back injury, Defendant was not able to perform the one leg stand test.

The Motion to Suppress

Defendant's Motion to Suppress is two-fold. First, Defendant asserts Pfc. Granados' actions were illegal under 21 *Del. C.* § 701. Section 701 prohibits a police officer from making arrests for violations of Title 21 unless that violation occurred in the officer's presence.[3] Defendant also posits that Pfc. Granados improperly asked Defendant to perform field sobriety tests after Defendant had invoked his right to counsel in clear language. The arguments will be addressed in turn.

A. The alleged violation of 21 *Del. C.* § 701

Defendant argues his arrest was in violation of 21 *Del. C.* § 701 because the officer did not witness him engaging in any traffic violations when he arrested Defendant. Defendant asserts he was arrested when Pfc. Granados asked Defendant to stay at his vehicle with another officer while Pfc. Granados returned to the Food Lion to speak to a witness. The State asserts Defendant was only legally and temporarily detained for investigatory purposes while Pfc. Granados obtained further information concerning the alleged erratic driving. Because Defendant was not arrested until after additional investigation by Pfc. Granados, the State contends 21 *Del. C.* § 701 does not apply.

The Court agrees with the State. In order for an officer to detain someone temporarily for the purposes of investigation, the officer need only have a reasonable articulable suspicion of criminal activity. *See Terry v. Ohio*, 392 U.S. 1 (1968). The reasonable articulable suspicion required for an investigatory stop must be based upon "specific and articulable facts which, when taken together with rational inferences from those facts, reasonably warrant that intrusion." *Id*. at 21. In this case, the officer responded to a 911 call concerning dangerous driving. Upon arriving at the

[3] Some minor exceptions to this general rule are articulated in the statute. None of those exceptions is at issue in this case.

scene, he interviewed the caller (the Food Lion employee) and heard from another witness that she had almost been struck by Defendant's vehicle. That witness identified Defendant and the police officer approached Defendant's car to make contact with Defendant. A police officer is permitted to rely upon statements made by a third party in making a determination of reasonable articulable suspicion. *State v. Quinn*, 1995 WL 412355, at * 3-4 (Del. Super.) ("[T]here is a presumption of reliability of statements made by concerned citizens to police authorities, given their interest in stopping criminal wrongdoing.... [C]oncerned citizens have very little motivate to fabricate when informing the authorities about possible criminal activities."). As Judge Gebelein found in *Quinn*, there is no reason evident from the record to doubt the credibility of the third party witnesses in this case. As such, the Court finds the officer had reasonable articulable suspicion to approach Defendant for purposes of conducting a *Terry* stop to inquire as to the erratic driving complaint. Once Defendant rolled down his window and Pfc. Granados smelled the strong smell of alcohol, he then had a reasonable articulable suspicion to conduct further investigation into whether Defendant was driving under the influence. *See Pike v. Shahan*, 2002 WL 31999372, at *2 (Del. Com. Pl.) ("a detention of an individual for the purpose of conducting a field sobriety test is analogous to a *Terry* investigatory stop").

In sum, the Court concludes Defendant was not placed under arrest when he was detained for purposes of investigating the erratic driving complaint or when he was detained for purposes of investigating whether he was driving under the influence. Defendant's Motion to Suppress is denied in this regard.

B. The alleged *Miranda* violation

At the suppression hearing, Pfc. Granados testified that, when he approached Defendant and smelled the strong odor of alcohol, he asked Defendant if he had been drinking. In response to that inquiry, Defendant said, "You'll have to talk to my lawyer," or words to that effect. Nevertheless, Defendant was asked to stay with another responding police officer while Pfc. Granados returned to the Food Lion to speak to witnesses. Upon Pfc. Granados's return, he asked Defendant to perform some field sobriety tests (FST), which Defendant did. Defendant now argues his voluntary submission to FST was a violation of his *Miranda* rights. *See Miranda v. Arizona*, 384 U.S. 436 (1966). His argument has no merit.

The United States Supreme Court has held the vast majority of FST are not testimonial in nature. *Pennsylvania v. Muniz*, 496 U.S. 582 (1990). A FST contains a testimonial component only when "a suspect is asked for a response requiring him to communicate an express or implied assertion of fact or belief." *Id*. at 597. Delaware case law has followed this rationale, as well. *State v. Smith*, 91 A.2d 188 (Del. Super. 1952) (holding defendant's constitutional privilege against self incrimination was not violated by reason of the sobriety test administered). Defendant was asked to perform the horizontal gaze nystagmus test, the alphabet test, the counting test, the walk-and-turn test and the one leg stand test. All of these tests are designed to measure the ability of a suspect "to conduct himself or herself in a manner that does or does not indicate impairment" and, thus, the tests are not testimonial in nature. *Sutherland v. State*, 2006 WL. 1680027, at *4 (Del. Super.). Because the FST were not testimonial in nature, the results of the field test shall not be suppressed.

Defendant's Motion to Suppress is denied on this ground as well.

Conclusion

For the reasons stated herein, Defendant's Motion to Suppress is DENIED.

IT IS SO ORDERED.

Very truly yours,

T. Henley Graves

cc: Prothonotory